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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 904

ALINE P. WEISS and ALICE K. POLLITZER,

Appellants,

—v.—

JOHN W. GARDNER, Secretary of the Department of Health, Education and Welfare, and BERNICE L. BERNSTEIN, Regional Director of Department of Health, Education and Welfare,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Opinion Below

The opinion of the three-judge district court was filed on October 11, 1966 and is set forth in full in the Record (the majority opinion at R. 110; the dissenting opinion of Judge Bonsal at R. 117), and in the Appendix, *infra*, p. 15 and p. 22. The opinion of Judge Bonsal ordering the convening of the three-judge court is contained in the Record at R. 92, and in the Appendix, *infra*, p. 31.

Jurisdiction

This appeal is from the judgment entered pursuant to the opinion of the three-judge court which dismissed this action solely on the grounds that the plaintiffs-appellants did not have standing to sue and therefore the court lacked jurisdiction of the subject matter.

In their complaint filed on February 24, 1966, plaintiffs attacked the constitutionality of

(i) Section 103(b)(1) of the Social Security Amendments of 1965, which prohibits an individual otherwise eligible for Medicare hospital insurance benefits from receiving such benefits if he is a member of any one of certain designated "Communist" organizations; and

(ii) the use of a disclaimer statement in the application form whereby each applicant is asked to disclaim membership in such organizations;

and sought an injunction against the enforcement of the Section and the use of the disclaimer.

This action arises under the Constitution and the laws of the United States, 28 U. S. C. §1331. The court below had jurisdiction pursuant to Section 2201 *et seq.* of Title 28 of the United States Code.

The single-judge District Court, in granting plaintiffs' motion to convene a three-judge court pursuant to 28 U. S. C. §2282 and §2284, had denied the Government's motion to dismiss the complaint for lack of jurisdiction over the subject matter and for failure to exhaust administrative remedies (App. pp. 31-36).

Notice of appeal was filed in the District Court for the Southern District of New York on October 27, 1966.

The statutory provision which confers jurisdiction of the appeal upon this Court is 28 U. S. C. §1253.

Questions Presented

1. Did plaintiffs lack standing to bring this action simply because they refused to state in the application form that they belonged to a proscribed "Communist" organization and failed to allege and prove their membership in such an organization?

2. Can an individual otherwise eligible for hospital insurance benefits be constitutionally denied such benefits because of mere membership in an organization, registered or required by a final order of the Subversive Activities Control Board to register under the Internal Security Act of 1950, as amended, as a Communist-action, Communist-front or Communist-infiltrated organization, without regard to whether he is aware of its purposes or has the specific intent to further its unlawful aims?

Statutes Involved

The Social Security Amendments of 1965, Public Law 89-97, 79 Stat. 286 (the "Act"), added a Medicare program for the aged to the existing Social Security Act (42 U. S. C. §301 *et seq.*), consisting of hospital insurance benefits and supplementary medical insurance benefits. Section 103(a) of the Act provides that a class of persons over age 65 who for various reasons are not entitled to old age payments

under the regular social security system are nevertheless eligible for the hospital insurance benefits of the Medicare program.

Section 103(b)(1) of the Act (note to 42 U. S. C. §426) contains the following special provisions applicable to such persons:

> "(b) The provisions of subsection (a) shall not apply to any individual who—
>
> (1) is, at the beginning of the first month in which he meets the requirements of subsection (a), a member of any organization referred to in Section 210 (a)(17) of the Social Security Act . . ."

Section 210(a)(17) of the Social Security Act (42 U. S. C. §410(a)(17)) refers to an organization which

> ". . . is registered, or there is in effect a final order of the Subversive Activities Control Board requiring such organization to register, under the Internal Security Act of 1950, as amended, as a Communist-action organization, a Communist-front organization, or a Communist-infiltrated organization, . . ."

Statement

Plaintiffs, Alice K. Pollitzer (age 96) and Aline P. Weiss (age 70), mother and daughter, are admittedly members of the class of persons who are entitled to hospital benefits under Section 103(a) of the Act unless they are members of a proscribed Communist organization pursuant to the provisions of Section 103(b)(1) of the Act (App. pp. 16, 31).

Solely to determine membership in such proscribed organizations, the application form (SSA-18) for securing hospital benefits contains the following disclaimer of membership:

> "In connection with my application for hospital insurance entitlement I certify that I am not now, and during the last 12 months have not been a member of any organization which is required to register under the Internal Security Act of 1950, as amended, as a Communist-action organization, a Communist-front organization, or a Communist-infiltrated organization." *

The plaintiffs declined to answer this disclaimer.

In explanatory material sent to plaintiffs and others similarly situated, the Government represented that they were required to "answer all questions" on the application form (R. 25, App. p. 27). After plaintiffs instituted this action, the Government filed two affidavits** indicating that plaintiffs might file applications and refuse to answer the disclaimer. Futterman Affidavit #1 indicated that, if such an applica-

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* This was the statement appearing on the form at the time of the filing of the plaintiffs' action. In its place, there is now the following question:

> "Are you now a member of any organization which is required to register under the Internal Security Act of 1959 as a Communist-action organization, a Communist-front organization, or a Communist-infiltrated organization?"

The three-judge District Court correctly assumed that the plaintiffs are equally unwilling to answer this question.

** These two affidavits executed by Jack S. Futterman, Assistant Commissioner of Administration for the Social Security Administration, dated March 30, 1966 and May 2, 1966, respectively appear at p. 66 and p. 80 of the Record. They are referred to herein as Futterman Affidavit #1 and Futterman Affidavit #2, respectively.

tion were filed, the Social Security Administration would check "available outside sources" to ascertain whether plaintiffs were members of a proscribed organization; Futterman Affidavit #2 indicated that an inquiry would be made of the Department of Justice to see whether it had any information in its files that plaintiffs were members of a proscribed organization.

Neither the complaint nor any other papers filed in this action disclose whether either of the plaintiffs is a member of a proscribed organization or if either of them could answer the disclaimer, assuming its meaning were clear, without fear of prosecution.

The three-judge District Court did not decide the question of the constitutionality of Section 103(b)(1) because of its ruling that plaintiffs lacked standing. However, on November 14, 1966, a three-judge federal district court in California held that Section 103(b)(1) violated rights guaranteed under the First Amendment of the United States Constitution. *Reed* v. *Gardner* (No. 66-1224-TC-Civil, U. S. District Court, Central District of California). (The opinion is printed in full in the Appendix, *infra*, p. 37.)

The Questions Are Substantial

1. *Plaintiffs Have Standing to Challenge the Constitutionality of Section 103(b)(1) and of the Use of the Disclaimer.*

The gist of the majority opinion below seems to be that plaintiffs lack standing because they did not show membership in a proscribed organization. "So far as appears from the pleadings, plaintiffs do not belong to those organiza-

tions. They are therefore not affected by Section 103(b)" (App. p. 18).

To make standing depend upon an admission of an applicant that he belongs to a proscribed "Communist" organization is, in effect, to require him to waive his privilege against self-incrimination. See, e.g., *Albertson* v. *SACB*, 382 U. S. 70 (1965); *Patricia Blau* v. *United States*, 340 U. S. 159 (1950); *Irving Blau* v. *United States*, 340 U. S. 332 (1951).

The majority opinion does not go this far in so many words. Instead it accepts as a satisfactory alternative the procedure recommended in the Futterman Affidavits whereby plaintiffs apparently need not answer the disclaimer and incriminate themselves. To our knowledge, the Government has never made a public announcement that the disclaimer need not be answered. Only the few who have brought lawsuits have learned of this alternative. This tactic should not destroy plaintiffs' right to raise the serious constitutional issues at stake here and, as indicated below, does not leave them unaffected by the Section.

The Government's approach here is similar to its tactics in a case challenging the constitutionality of a statute regulating the mailing of "Communist political propaganda" *Heilberg* v. *Fixa*, 236 F. Supp. 405 (1964), *aff'd sub nom.*, *Lamont* v. *Postmaster General*, 381 U. S. 301 (1965). In *Heilberg*, the Government argued that plaintiff's action was moot because, by instituting it, he gave the Government notice that he wished to receive mail. Here, plaintiffs have given the Government notice that they do not wish to answer the disclaimer, so the Government now maintains plaintiffs need not to do so and that, therefore plaintiffs lack stand-

ing. This approach was decisively rejected in *Heilberg* because the statute required continuing interference with and classification of the plaintiff's mail.* 236 F. Supp. at 407.

Similarly, in this case, the Government has a continuing statutory obligation to determine, in one way or another, plaintiffs' political associations in order to implement the Section. And, certainly, plaintiffs need not rely on the Government's apparent willingness to enforce the Section half-heartedly by means of a check of available information in the files of the Justice Department. What if such information is ambiguous? Can the FBI be asked to clarify or bring it up-to-date by an investigation? One cannot predict with any certainty what kind of additional inquiries may be made by Social Security Administration officials throughout the country trying to give effect to the Section. The sanguine and conjectural view of the majority opinion below that only "a clerk's routine check of Government records" (App. p. 21) will occur if the disclaimer is not answered appears to be incorrect. In fact, the court in *Reed* v. *Gardner* indicated that such an application does result in considerable delay in processing (six months there rather than the usual 30 days) and also in persistent efforts by the Government to secure an answer to the question in the disclaimer and in the possibility of a prosecution for failure to disclose membership. App. pp. 38-42.

Accordingly, plaintiffs are affected by Section 103(b)(1) which requires investigation into their political associa-

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* In *Reed* v. *Gardner*, *supra*, the court determined the constitutionality of the Section even though the application for hospital benefits of plaintiff (Reed) had actually been granted.

tions that can result in harm to them, in among other ways, by delaying the processing of their applications if executed without answering the disclaimer. The imposition of any additional burden on plaintiffs to carry out the terms of the Section gives them a sufficient interest to question the constitutionality of the Section which should be determined before and not after plaintiffs are adversely affected.

Even if plaintiffs admitted that they do not belong to a proscribed organization, they would have standing to attack the Section. See *Cramp* v. *Bd. of Public Instruction*, 368 U. S. 278 (1961). The majority opinion attempts to distinguish *Cramp* by the statement that "this is not an oath case" (App. p. 19). This is a distinction without a difference. The relevant rationale of *Cramp* is that a person subject to a prohibition which deters constitutionally protected First Amendment activity has standing even if in fact the prohibition might not apply to him.

The "chilling effects" of the Section and its implementing disclaimer on constitutionally protected conduct of plaintiffs and others similarly situated, whether or not they are members of a proscribed organization, seem clear. For example, a citizen approaching 65 and not covered by Social Security will be deterred from joining an organization which opposes the Vietnam War for fear that it is or may be a proscribed organization.* The Government conceded at the hearing before the court below that no information has been disseminated to the public by the Social Security Administration listing the presently proscribed or-

* For example, the DuBois Clubs, against which proceedings have been initiated to denominate it a Communist front organization under Section 8(b) of the Subversive Activities Control Act (50 U. S. C. §786(b)).

ganizations (App. pp. 22-23). Some who do not know they can refuse to answer the disclaimer may disclose their political associations or lack thereof even though they have conscientious objections to answering such questions. As Judge Bonsal's dissent indicated:

> "... Others, rather than inquire at an office of the Administration as to the organizations covered by Section 103(b), might disassociate themselves from any unpopular group even though they are completely loyal to the Constitution of the United States. Others, who for reasons of principle do not wish to sign the disclaimer or subject themselves to an investigation, might forego applying for hospital insurance" (App. pp. 25-26).

Furthermore, assuming *arguendo* that plaintiffs lack standing to sue on their own behalf, we submit that this is one of those unusual cases where plaintiffs may assert the constitutional rights of others and, in any event, the question whether this is such a case is itself a substantial constitutional question. See generally Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L. J. 599 (1962).

While a person usually cannot assert the constitutional rights of others, this judicially-created rule of standing should not apply where fundamental First Amendment rights may be infringed by a statute allegedly unconstitutional on its face and where it would be difficult for and unrealistic to expect the older persons whose rights are being infringed to bring lawsuits in their own right. See *Freedman* v. *Maryland*, 380 U. S. 51, 56-57 (1965); *Dombrowski* v. *Pfister*, 380 U. S. 479, 486-87, 490-491 (1965);

Barrows v. *Jackson*, 346 U. S. 249, 255-257 (1953); *Thornhill* v. *Alabama*, 310 U. S. 88 (1940).

2. *Section 103(b)(1) Is Unconstitutional.*

(a) Section 103(b)(1) violates First Amendment rights, because it penalizes persons for membership in certain political organizations without regard to the nature of such membership. *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966); *Reed* v. *Gardner*, *supra*; *Sherbert* v. *Verner*, 374 U. S. 398 (1963).

(b) It denies plaintiffs due process of law. Section 103(b)(1), in effect, establishes a conclusive presumption that a member of a proscribed organization shares its unlawful aims whether or not he knows of such aims. Such indiscriminate classification of innocent and knowing activity is a denial of due process. *Aptheker* v. *United States*, 378 U. S. 500 (1964); *Wieman* v. *Updegraff*, 344 U. S. 183 (1952).

(c) It is a bill of attainder. The Section is unconstitutional as a bill of attainder for the same reasons which caused this Court to hold that Section 504 of the Labor Management Reporting & Disclosure Act of 1959 was a bill of attainder in *United States* v. *Brown*, 381 U. S. 437 (1965).

3. *The Decision Below Conflicts with* Reed v. Gardner.

The decision below is in conflict with *Reed* v. *Gardner*, *supra*, on the question of standing since *Reed* held that the plaintiff had standing even though her application for hospital benefits had been granted. If the Government appeals *Reed* v. *Gardner*, it would be appropriate to consider the two cases together.

CONCLUSION

For the reasons stated above, jurisdiction should be noted.

Respectfully submitted,

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December 21, 1966

APPENDIX

Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Civil 498

ALINE P. WEISS and ALICE K. POLLITZER,

Plaintiffs,

—v.—

JOHN W. GARDNER, as Secretary of Department of Health, Education and Welfare, and BERNICE L. BERNSTEIN, Regional Director, Department of Health, Education and Welfare,

Defendants.

The Plaintiffs' motion to convene a three judge court having been granted, and an order designating Honorable Paul R. Hays, United States Circuit Judge, Honorable Dudley B. Bonsal, United States District Judge, and Honorable Inzer B. Wyatt, United States District Judge as the Statutory Court to resolve the issues herein, in that the plaintiffs seek a declaratory judgment, declaring that Section 103 (b) of the Social Security Act Amendments of 1965, Public Law 89-97, 79 Stat. 286, 42 U. S. C. 1395-(11) (Supp. I, 1965) is in certain respects unconstitutional, Defendants seek a dismissal of the complaint pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure on

the ground that this Court lacks jurisdiction over the subject matter. Defendants also contend that they are entitled to summary judgment, and request such a judgment, and the matter having come on for a hearing before the above Court on June 7th, 1966, and the Court at the conclusion of the hearing reserved its decision, and the Court thereafter on October 11th, 1966 having handed down its opinion, the Honorable Paul R. Hays, USCJ., and the Honorable Inzer B. Wyatt, USDJ., concurring and the Honorable Dudley B. Bonsal, USDJ., dissenting, and the concurring opinion of the Court is that there is no genuine issue of material fact as to the jurisdictional point, that summary judgment for the defendants be entered because plaintiffs have no standing to sue, and that this Court is without jurisdiction of the subject matter, it is

ORDERED, ADJUDGED and DECREED: That the defendants, John W. Gardner, as Secretary of Department of Health, Education and Welfare and Bernice L. Bernstein, Regional Director, Department of Health, Education and Welfare have judgment against the plaintiffs, Aline P. Weiss and Alice K. Pollitzer dismissing the complaint herein on the ground that this Court lacks jurisdiction of the subject matter herein.

Dated: New York, N. Y.
October 13, 1966.

JOHN J. OLEAR, JR.,
Clerk.

Majority Opinion of the District Court

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

66 Civ. 498

ALINE P. WEISS and ALICE K. POLLITZER,

Plaintiffs,

—v.—

JOHN W. GARDNER, as Secretary of the Department of Health, Education and Welfare, and BERNICE L. BERNSTEIN, Regional Director, Department of Health, Education and Welfare,

Defendants.

(Argued June 7, 1966 Decided October 11, 1966)

WILLIAM D. ZABEL, American Civil Liberties Union, New York, N. Y. (Melvin L. Wulf, New York, N. Y., on the brief), *for Plaintiffs.*

ROBERT E. KUSHNER, Assistant United States Attorney for the Southern District of New York (Robert M. Morgenthau, United States Attorney, Benjamin C. Flannagan and Garvin L. Oliver, Attorneys for the Department of Justice, on the brief), *for Defendants.*

Before:

HAYS, *Circuit Judge,*
BONSAL and WYATT, *District Judges.*

Majority Opinion of the District Court

HAYS, *Circuit Judge*:

This is an action for a declaratory judgment declaring that Section 103(b) of the Social Security Act Amendments of 1965, Public Law 89-97, 79 Stat. 286, 42 U.S.C. 1395-(11) (Supp. I, 1965), is unconstitutional in certain respects, and that "the use of" a clause in a prescribed form of application for hospitalization insurance under the Act is also unconstitutional. Plaintiff's application for the convening of a three-judge court was granted. See *Weiss* v. *Gardner*, 66 Civ. 498 (S.D.N.Y. May 10, 1966).

Plaintiffs have moved for summary judgment. Defendants seek dismissal of the complaint for lack of jurisdiction over the subject matter (Fed. R. Civ. P. 12(b)(1)). Defendants also contend, but without a specific written motion, that they are entitled to summary judgment and request such a judgment.

It appearing that there is no genuine issue of material fact as to the jurisdictional point, we direct summary judgment for defendants because plaintiffs have no standing to sue, there is thus no justiciable controversy, and this Court is without jurisdiction of the subject matter.

Mrs. Pollitzer and Mrs. Weiss, mother and daughter, are both entitled under Section 103(a) of the Social Security Act to hospital benefits. They were unwilling however to subscribe to the following statement which appears in the form to be filed in connection with securing these benefits:

> "In connection with my application for hospital insurance entitlement I certify that I am not now, and during the last 12 months have not been a member of any organization which is required to register under the

Internal Security Act of 1950, as amended, as a Communist-action organization, a Communist-front organization, or a Communist infiltrated organization."[1]

The clause was included in the application form because of the provisions of Section 103(b) of the Act. Section 103(a) provides for coverage for the hospitalization portion of the Medicare program of about 2,700,000 persons who are over sixty-five years of age but who for various reasons are not entitled to old age payments under the regular social security system. With respect to this group, and only this group, the Act in Section 103(b) provides:

"(b) The provisions of subsection (a) shall not apply to any individual who—

(1) is, at the beginning of the first month in which he meets the requirements of subsection (a), a member of any organization referred to in section 210(a)(17) of the Social Security Act. . . ."

The organizations referred to in Section 210(a)(17), 42 U.S.C. §410(a)(17), are organizations which are registered, or are required by a final order of the Subversive Activities Control Board to register, under the Internal Security Act of 1950, as amended, 50 U.S.C. §§781-98, as

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[1] This was the statement appearing on the form at the time of the filing of the plaintiffs' action. In its place there is now the following question:

"Are you now a member of any organization which is required to register under the Internal Security Act of 1950 as a Communist-action organization, a Communist-front organization, or a Communist-infiltrated organization?"

We will assume that plaintiffs would be equally unwilling to answer this question.

Communist-action organizations, Communist-front organizations, or Communist infiltrated organizations.

As regards the request for a declaratory ruling that Section 103(b) is unconstitutional, the plaintiffs have failed completely to state any claim which would entitle them to such a ruling. It does not appear from plaintiffs' complaint or from any other papers filed in the action that plaintiffs belong or have ever belonged or contemplate belonging to any organization which is mentioned in Section 210(a)(17). No basis is suggested for believing that they run the slightest risk of being denied hospitalization under Section 103(b). It must be noted that we are not here concerned with the government's right to ask them whether or not they belong to such an organization. That problem is a different one and one we reach hereafter. Section 103(b) makes no provision for asking anybody anything. It provides merely that those who belong to certain organizations are not eligible for hospitalization. So far as appears from the pleadings, plaintiffs do not belong to those organizations. They are therefore not affected by Section 103(b).

Plaintiffs have no standing to attack Section 103(b) on the ground that others who do belong to the organizations referred to may be denied hospitalization. If plaintiffs could assert such rights for others with whom they have nothing relevant in common, so could any one who chose to take up the cudgels in behalf of those who are affected by the statute. If, as is generally supposed, there are a very small number of people who are now members of organizations required to register (because of Communist orientation) under the Internal Security Act of 1950, then it might even prove true in the practical application of the

statute that no one at all will come within the terms of Section 103(b).

As the court said in *Lamont* v. *The Postmaster General,* 229 F. Supp. 913, 917-18 (S.D.N.Y. 1964), rev'd on other grounds, 381 U.S. 301 (1965)

> "a litigant who invokes the power to annul legislation on grounds of its unconstitutionality 'must be able to show . . . that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement,' *Massachusetts* v. *Mellon,* 262 U.S. 447, 488, 43 S. Ct. 597, 601, 67 L. Ed. 1078 (1923); see *Poe* v. *Ullman,* 367 U.S. 497, 502-09, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961) (opinion of Frankfurter, J.); *Communist Party* v. *Subversive Activities Control Bd.,* 367 U.S. 1, 70-81, 81 S. Ct. 1357, 6 L. Ed. 2d 625 (1961); Comment, Threat of Enforcement—Prerequisite of a Justiciable Controversy, 62 Colum. L. Rev. 106 (1962)."

See *Frankel* v. *Gardner,* No. 40007 (E.D. Pa.) July 8, 1966.

It is quite clear then that plaintiffs fail to assert any of the basic facts which would entitle them to raise the claim that Section 103(b) is unconstitutional.

However, plaintiffs also urge unconstitutionality of "the use of" the application form for hospital entitlement since it asks for a certification that the applicant does not belong to any of the organizations referred to in Section 103(b).

In the first place it should be noted that this is not an oath case. See, for example, *Cramp* v. *Board of Public Instruction,* 368 U.S. 278 (1961). Section 103(b) does not provide that applicants for hospitalization will not be

eligible unless they take an oath that they do not belong to the listed organizations. As far as Section 103(b) is concerned, if applicants are members they are ineligible, if they are not members they are eligible. There is no requirement in the statute that applicants state, let alone swear, whether they are members or not. The presence of the certification on the application form is merely a matter of convenience for the Social Security Administration. It will accept the certificate rather than check the record of each individual applicant.

As far as appears from the complaint, the plaintiffs could sign the certificate to which they object. They make no claim that they are members of any of the organizations in question. As with respect to the unconstitutionality of Section 103(b), plaintiffs fail to allege any facts which tend to show that they are members of a class who will suffer any injury from signing. Moreover, according to the government's affidavit, a disclaimer is taken as true and no further check is made.

If plaintiffs, in spite of the fact that they could sign the certificate object to doing so, they may strike out the certificate. An affidavit submitted on behalf of the defendant states that some applicants have done this and that in such cases the Social Security Administration has inquired of the Department of Justice as to whether the applicant is listed as a member of one of the relevant organizations. Plaintiffs call this an "investigation" and object to it. But in no real sense can they be harmed by an examination of the material on file in the Department of Justice. The word "investigation" may have acquired a sinister significance in some circles because of the activities of some con-

gressional investigating committees. Obviously a clerk's routine check of government records is not an "investigation" in the sense in which plaintiffs use the word.

Although the plaintiffs do not claim that they themselves are in any doubt as to whether they are members of the organizations referred to in Section 103(b), they seek to argue that the certificate suffers from vagueness, in that it does not list the organizations to which it refers. Since applicants are not asked to swear to non-membership nor indeed even required by the statute to answer any questions as to membership, they can properly state that they do not know whether they are members or not if that is the case. Having so answered the question, they would still be treated as eligible for hospitalization unless they are listed as members in the government records.

It is thus clear that not only do the plaintiffs fail to establish standing to attack the constitutionality of the statute, they also fail to show that they are in any way harmed by "the use of" the application form.

The Clerk is directed to enter judgment dismissing the action for lack of jurisdiction of the subject matter.

PAUL R. HAYS
U.S.C.J.

INZER WYATT
U.S.D.J.

October 11, 1966

Dissenting Opinion of Bonsal, *D.J.*

BONSAL, District Judge:

I respectfully dissent from the holding of the majority directing summary judgment for defendants "because plaintiffs have no standing to sue, there is thus no justiciable controversy, and this Court is without jurisdiction of the subject matter."

Plaintiffs are citizens and residents of the United States, have attained the age of 65 years, and are not presently covered under other provisions of the Social Security Act (Act). Therefore, under Section 103(a) they are members of the class (estimated at 2,700,000 persons) which is entitled to file an application and, upon approval thereof, to receive hospital insurance benefits. Section 103(b), the constitutionality of which is here challenged, provides that such hospital insurance benefits will not be extended to persons who are members of an organization which is registered, or as to which there is in effect a final order of the Subversive Activities Control Board requiring it to register as a Communist-action, Communist-front, or Communist-infiltrated organization.

The majority conclude that since plaintiffs have not shown membership in such an organization, they have no standing to sue. It follows that, according to the majority, only a member of a Communist-action, Communist-front or Communist-infiltrated organization has standing to seek a declaratory judgment. With this I cannot agree. Neither the plaintiffs nor any other member of the class knows or can know whether or not he is listed as a member of such an organization in some Government file. The Government

conceded at the hearing that no information has been disseminated to the public by the Social Security Administration listing the organizations involved. Few, if any, of the 2,700,000 potential applicants will know what organizations are included or, if they do, whether their names may be found in some Government file as members. Plaintiffs and the other members of the class have no way of knowing whether they may be damaged or not until after they file their applications.

Plaintiffs contend that absent a determination of the constitutionality of Section 103(b), the filing of applications infringes their rights of freedom of association guaranteed under the First Amendment and denies them due process under the Fifth Amendment. If they file applications and deny membership or refuse to disclaim membership, they subject themselves to inquiry or investigation by the Administration. Since in their view Section 103(b) is unconstitutional on its face, plaintiffs argue that to subject themselves to such an inquiry or investigation has "chilling" effects on their First Amendment rights and denies them due process.

In *Cramp* v. *Bd. of Public Instruction,* 368 U.S. 278 (1961), the Supreme Court had occasion to rule on the constitutionality of a Florida statute requiring all employees of the State, as a condition of their employment, to execute a written oath which included the phrase, "that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party." Cramp was requested to take the oath, but refused. He instituted an action in the Florida State courts for a judgment declaring the

oath unconstitutional and for an injunction barring the State from requiring him to sign the oath or from discharging him after his failure to do so. In his complaint, Cramp asserted that he supported the Constitutions of the United States and Florida, that he was not a member nor a supporter of the Communist Party or of any other organization advocating directly or indirectly the overthrow of established forms of government, and that he was "a loyal American and [did] not decline to execute or subscribe to the aforesaid oath for fear of the penalties provided by law for a false oath."

In view of these allegations, the Supreme Court of Florida ruled that Cramp lacked standing to attack the statute on constitutional grounds. In reversing, the Supreme Court noted Cramp's contention that the statute "impinge[d] upon his constitutionally protected right of free speech and association, and that the language of the required oath [was] so vague and uncertain as to deny him due process of law." In response to the argument that Cramp's sworn complaint showed that he could not possibly sustain injury by executing the oath, the Court stated that:

> "Whatever the merits of this argument, it has, we think, no application to appellant's claim that the statutory oath is unconstitutionally vague. The vices inherent in an unconstitutionally vague statute—the risk of unfair prosecution and the potential deterrence of constitutionally protected conduct—have been repeatedly pointed out in our decisions. [Citations omitted.] These are dangers to which all who are compelled to execute an unconstitutionally vague and indefinite oath

may be exposed. *Cf. Thornhill* v. *Alabama,* 310 U.S. 88, 96-98."

On these grounds, the Court held that Cramp had standing to sue and that the oath was invalid as unconstitutionally vague and in violation of Cramp's rights under the Fifth Amendment. In concurring, Justices Douglas and Black found the statute unconstitutional under the First Amendment as well.

Plaintiffs' attack on Section 103(b) is not that the statute is unconstitutionally vague as in *Cramp,* but that 103(b) is unconstitutionally broad in that it contains no requirement of *scienter. Wieman* v. *Updegraff,* 344 U.S. 183 (1952). Under Section 103(b) plaintiffs or any other member of the class will be disqualified from receiving hospital insurance benefits if he discloses membership in a subversive organization or, following an investigation, is found to be a member of a subversive organization, regardless of whether he was aware of the purposes of such an organization or whether he had the specific intent to further its unlawful aims. Conditioning the right to receive hospital insurance on the willingness to submit to such an unconstitutionally broad investigation, say the plaintiffs, will deter constitutionally protected conduct.

For instance, plaintiffs assert that a senior citizen approaching 65 and not covered by Social Security will be deterred from joining an organization which states it is opposed to the war in South Vietnam for fear that it may be or may become a proscribed organization under Section 103(b). Others, rather than inquire at an office of the Administration as to the organizations covered by Section

103(b), might disassociate themselves from any unpopular group even though they are completely loyal to the Constitution of the United States. Others, who for reasons of principle do not wish to sign the disclaimer or subject themselves to an investigation, might forego applying for hospital insurance.

Under these circumstances, there seems no more basis for requiring these plaintiffs to file applications, thereby submitting themselves to investigation under an allegedly unconstitutionally broad statute, than there was for requiring Cramp to sign the Florida oath. The Supreme Court noted in *Cramp* that, "it is not material whether the appellant could honestly subscribe to the oath." Here it is not material whether the plaintiffs could honestly sign the disclaimer. As in *Cramp,* plaintiffs assert not only their rights, but the rights of other persons in the class. While the court in *Heilberg* v. *Fixa,* 236 F.Supp. 405, 407 (N.D. Cal. 1964), *aff'd sub nom. Lamont* v. *Postmaster General,* 381 U.S. 301 (1965), pointed out that a person cannot usually assert the rights of others, this rule will not be applied where the fundamental constitutional rights of third parties may be denied by a statute allegedly unconstitutional on its face and it would be difficult for the persons whose rights are asserted to maintain a suit in their own right. See, *Freedman* v. *Maryland,* 300 U.S. 51, 56-57 (1965); *Dombrowski* v. *Pfister,* 380 U.S. 479, 486-487, 490-491 (1965); *Barrows* v. *Jackson,* 346 U.S. 249, 255-257 (1953); *Thornhill* v. *Alabama, supra.*

While I do not think that the plaintiffs' standing to bring this action is affected by defendants' assertion that if applicants fail to sign the disclaimer on Form SSA-18 the

Administration will independently investigate their organizational status, it should be noted that in their notice to applicants defendants urge them to be "sure to answer all the questions." On the application form, immediately above the line for applicant's signature, appears the legend, "Knowing that anyone making a false statement or representation of a material fact on this application is liable to penalty, I certify that the above statements are true." Only after this action was commenced did plaintiffs learn that they could file applications without making the disclaimer. The Administration states that its investigation of the organizational status of an applicant who has not signed the disclaimer will be limited to checking the files of the Justice Department. The plaintiffs contend, however, that Section 103(b) is unconstitutional on its face. If so, laxity in its enforcement would not make the statute constitutional.

For the reasons stated above, plaintiffs are entitled to a decision as to the constitutionality of Section 103(b) before they file their applications so that they will know whether they are required to respond to the disclaimer in any form.

Nor is the plaintiffs' standing undercut by their failure to file applications and exhaust administrative remedies before proceeding to the court. While the Supreme Court has held that "a strong showing is required, both of the inadequacy of the prescribed procedure and of impending harm, to permit short-circuiting the administrative process" (*Aircraft & Diesel Corp.* v. *Hirsch*, 331 U.S. 752 (1947)), it has not insisted on exhaustion of administrative rem-

edies when these requirements are met. See, *Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U.S. 77, 89 (1958); 3 Davis, *Administrative Law Treaties*, §200.4 (1958, Supp. 1965).

The Social Security Administration has no authority under the Act to award hospital benefits without requiring an answer to the disclaimer or conducting an investigation into membership in a proscribed organization. The Administration must deny such benefits if membership is found, irrespective of whether it appears that the applicant is an active member or whether he knowingly subscribes to the purposes of the organization. As stated by the Supreme Court in *Aptheker* v. *Secretary of State*, 378 U.S. 500, 515 (1964):

> "It must be remembered that '[a]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . .' or judicially rewriting it. *Scales* v. *United States*, . . . [367 U.S. 203] at 211."

Neither the Administration nor the Court may read a requirement of scienter into Section 103(b).

If the plaintiffs are nonetheless required to file applications and exhaust their administrative remedies, they must forego their claim that an investigation into their associations absent a reasonable governmental interest constitutes an unwarranted invasion of their First Amendment rights. See, *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *NAACP* v. *Alabama*, 357 U.S. 449 (1958). In the meantime other senior citizens, unaware of their rights or unable to

assert them, will disclose their organizational affiliations even though the Government, plaintiffs allege, has no right to require disclosure. Still others will be inhibited in exercising their First Amendment rights by avoiding association with controversial organizations.

In *Baggett* v. *Bullitt*, 377 U.S. 360 (1964), appellants were allowed to challenge a Washington loyalty oath required of teachers even though they would be entitled to a hearing before being dismissed for failure to subscribe to the oath and even though the Supreme Court of Washington had never construed the oath. In response to the argument that the Supreme Court should defer decision until the State court had had an opportunity to place a limiting interpretation on the oath, the Supreme Court stated that:

> "We also cannot ignore that abstention operates to require piecemeal adjudication in many courts [Citation omitted], thereby delaying ultimate adjudication on the merits for an undue length of time [Citations omitted], a result quite costly where the vagueness of a state statute may inhibit the exercise of First Amendment freedoms." 377 U.S., at 378-79.

Where, as here, the plaintiffs assert not only their own rights but the rights of others, and assert that the statute is unconstitutional on its face, such considerations take on added stature. See, *Freedman* v. *Maryland, supra; Dombrowski* v. *Pfister, supra.*

Since the majority has found that plaintiffs lack standing to maintain this action without reaching the issue of

the constitutionality of Section 103(b), it is inappropriate for me to say more than that in my view a constitutional question is presented.[1] I believe that the plaintiffs have standing and that the Court should have considered the constitutional question on the merits.

DUDLEY B. BONSAL
U.S.D.J.

[1] Under Section 103(b), an applicant disclosing membership or found to be a member of a so-called subversive organization is disqualified from receiving benefits under Section 103(a) without regard to whether he is aware of its purposes or whether it is established that he had the specific intent to further the unlawful aims of the organization. See, *Elfbrandt* v. *Russell*, 384 U.S. 11 (1966), where the court stated: "A law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of 'guilt by association' which has no place here." Section 103(b) denies benefits to both knowing and unknowing members of such organizations. See, *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964).

Opinion of Bonsal, *D.J.* Ordering the Convening of the Three-Man Court

BONSAL, J.:

Plaintiffs move for an order pursuant to 28 U. S. C. § 2284, convening a three-judge court to hear their application for summary judgment to declare unconstitutional Section 103(b)(1) of the Social Security Amendments of 1965 (The Act) (42 U. S. C. § 426. Note) which excludes an individual otherwise eligible for hospital insurance benefits under the Act from receiving such benefits if he is a member of a subversive organization referred to in Section 103(b)(1), and to enjoin the defendants from implementing said section by requiring plaintiffs to answer or sign the disclaimer statement contained in the application form for such benefits (Form SSA-18). Defendants cross-move for an order dismissing the complaint for lack of jurisdiction over the subject matter.

Concededly, the plaintiffs are citizens and residents of the United States, have attained the age of 65 years and are not presently covered under other provisions of the Social Security Act. Therefore, they are members of the class which is entitled to file an application under Section 103(a) (Form SSA-18) and upon approval of such application, to receive hospital insurance benefits. However, Section 103(b), the provision here challenged, provides that the hospital insurance benefits will not be extended to an individual, who was at the beginning of the first month in which he met the requirements of Section 103(a), a member of an organization described in Section 210(a)(17) of the Social Security Act (42 U. S. C. § 410(a)(17)). Section 210(a)(17) refers to an organization which is registered, or as to which there is in effect a final order of the Sub-

versive Activities Control Board requiring it to register under the Internal Security Act of 1950, as amended, as a Communist-action organization, a Communist-front organization or a Communist-infiltrated organization. To implement the provisions of Section 103(b) the application form (SSA-18) includes a specific disclaimer by the applicant of membership in any such organization.

Plaintiffs have not filed applications on Form SSA-18 and defendants point out that they may do so without making the disclaimer. In that event the Social Security Administration would make an independent investigation as to whether plaintiffs are members of a proscribed organization. If the administration found that they were not, the applications could be approved or the applications could be denied on grounds other than organizational membership. Defendants further point out that if plaintiffs' applications are denied for any reason, they are entitled to resort to the administrative remedies provided in the Social Security Act and if relief is there denied they can seek review by a court.

Defendants contend that since the plaintiffs may file their applications without answering the disclaimer, their action is moot. Defendants further urge that since plaintiffs have not filed applications and have not exhausted their administrative remedies the question of the constitutionality of Section 103(b) is not ripe for adjudication.[1]

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[1] In *Evans* v. *Gardner*, decided without opinion by the District Court for the District of Columbia on March 21, 1966 (Civil Action No. 463—66) that court so held in denying plaintiff's motion to convene a three-judge court and in granting the defendant's motion to dismiss the complaint for lack of jurisdiction, on the ground that plaintiff had failed to exhaust her administrative remedies.

Plaintiffs, on the other hand, contend that Section 103(b) insofar as it excludes members of subversive organizations from hospital insurance benefits is unconstitutional on its face and that they are entitled to a declaratory judgment to that effect and providing that they are not required to make the disclaimer contained in Form SSA-18. Plaintiffs argue that Section 103(b) places them in the position where they must either show membership in a subversive organization, deny such membership, or refuse to make the disclaimer called for in the application and undergo investigation by the Administration. To place them in this position, plaintiffs say, is to invite social disapprobation and to violate their rights under the First Amendment, the Fifth Amendment, and Article I, § 9, clause 3 (Bills of Attainder) of the Constitution.

Defendants' contention that plaintiffs' action is mooted by reason of the fact that they may file their applications without answering the disclaimer is met by the decision in *Heilberg* v. *Fixa,* 236 F. Supp. 405 (N.D. Cal. 1964), aff'd sub nom., *Lamont* v. *Postmaster General,* 381 U. S. 301 (1965). Such voluntary arrangements to avoid or delay the testing of constitutional questions do not necessarily invoke the doctrine of mootness. In its "Special Notice" to applicants for "Medicare Health Insurance" the Social Security Administration urges applicants to be "sure to answer all the questions . . ." Even if plaintiffs were to follow the new procedure suggested by the Administration of submitting their applications without answering the disclaimer, they would be subjected to an investigation as to their organizational membership. In either event an answer to the disclaimer would be obtained. Since the

plaintiffs are seeking declaratory relief as to their right not to respond to the disclaimer in any form, their action does not become moot for the reason that defendants may seek a response from other sources.

Defendants' contention that the constitutional validity of the disclaimer and the Act is not "ripe" for adjudication for the reason that plaintiffs have not filed their applications for health benefits is equally unfounded. In *Cramp* v. *Bd. of Public Instruction,* 368 U. S. 278 (1961), the Supreme Court held that the appellant had standing to challenge a Florida loyalty oath required to be signed by all schoolteachers in that state even though he admitted in an affidavit that he could sign the oath without fear of perjury or reprisal. In that case the appellant sought declaratory relief as to his right not to subscribe to the oath on the ground that it was unconstitutionally vague. Here the plaintiffs seek declaratory relief on the ground that the disclaimer has "chilling effects" on the exercise of First Amendment rights. See, *Sherbert* v. *Verner,* 374 U. S. 398 (1963); *Speiser* v. *Randall,* 357 U. S. 513 (1958); *NAACP* v. *Alabama,* 357 U. S. 449 (1958). Plaintiffs are members of the class entitled to apply for benefits under the Act. They contend that being compelled to answer the disclaimer or to undergo an investigation as to their organizational membership impinges on their rights to freedom of association and due process. Their right to refuse to sign the disclaimer and to seek declaratory relief to that effect is "ripe" for adjudication. *Elfbrandt* v. *Russell,* —— U. S. —— (April 18, 1966).

As to defendants' contention that plaintiffs have failed to exhaust their administrative remedy the Supreme Court

has held that, "a strong showing is required, both of the inadequacy of the prescribed procedure and of impending harm, to permit short-circuiting the administrative process." *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U. S. 752 (1947), at p. 774. However, the Social Security Administration has no authority under the Act to award hospital benefits without inquiry into membership in a proscribed organization, and must deny such benefits if membership is found. In *Cramp, supra* and *Elfbrandt, supra,* as well as in *Baggett* v. *Bullitt,* 377 U. S. 360 (1964), the plaintiffs would have been entitled to hearings before being discharged from their positions for refusal to subscribe to loyalty oaths. But in none of these cases did the doctrine of exhaustion of administrative remedies bar judicial consideration.

If, on the other hand, plaintiffs are required first to pursue their administrative remedy before applying to the courts, they and others in their position may suffer substantial harm. See, *Freedman* v. *Maryland,* 380 U. S. 51 (1965); *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965). Plaintiffs will have to forego their claim of a right in the first instance to be free of inquiry as to their organizational affiliations. Other applicants for health benefits will be faced by the same dilemma confronting the plaintiffs. Accordingly, the Court is of the view that this is one of those rare cases which is ripe for adjudication without a showing that administrative remedies have been exhausted. See *Chicago* v. *Atchison, Topeka & Santa Fe R. Co.,* 357 U. S. 77 (1958); Davis, *Administrative Law Treatise,* Vol. 3, § 200.4 (1958, Supp. 1965).

Opinion of Bonsal, D.J. Ordering the Convening of the Three-Man Court

In doing so, the Court expresses no opinion as to the constitutionality of the provision of the Act here challenged other than to say that a constitutional question is presented.[2] The Court is of the view that it has jurisdiction at this time for the purpose of convening a three-judge court.

Plaintiff's motion to convene a three-judge court is granted and defendant's motion to dismiss the complaint is denied.

Settle order on notice.

Dated: New York, N. Y.,
May 10, 1966.

DUDLEY B. BONSAL
U.S.D.J.

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[2] Under § 103(b), an applicant disclosing membership or found to be a member of a so-called subversive organization is disqualified from receiving benefits under § 103(a) without regard to whether he is aware of its purposes or whether it is established that he had the specific intent to further the unlawful aims of the organization. See, *Elfbrandt, supra,* where the court stated: "A law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of 'guilt by association' which has no place here." Section 103(b) denies benefits to both knowing and unknowing members of such organizations. See, *Aptheker* v. *Secretary of State,* 378 U. S. 500 (1964).

Opinion of the District Court of California

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

No. 66-1224-TC Civil

ALDA T. REED, on behalf of herself and all persons similarly situated,

Plaintiff,

—v.—

JOHN W. GARDNER, as Secretary of the United States Department of Health, Education and Welfare,

Defendant.

Before:

ELY, *Circuit Judge,* CLARKE, *Chief District Judge,* and CRARY, *District Judge.*

PER CURIAM:

This case presents essentially a single question of law:

May eligibility for benefits under Section 103 (a) of the Health Insurance for the Aged Act (Medicare) (79 Stat. 333 (1965)) be conditioned upon nonmembership, or declaration of nonmembership, in a certain class of organizations described in Section 103 (b) of the Act?

Section 103 (b) (1) of the Act denies Medicare benefits to certain applicants who are members of organizations required to register under the Internal Security Act of 1950 as Communist-action, Communist-front, or Commu-

nist-infiltrated groups. The restriction is not imposed upon persons who are covered by hospital insurance provisions of the Social Security Act or of the Railroad Retirement Act.

Plaintiff, a United States citizen more than 65 years of age, is one to whom the provisions of Section 103 (a) and (b) would apply. She brings this action in behalf of herself and all other persons similarly situated. Plaintiff seeks an injunction against enforcement of Section 103 (b) (1) and a judgment that the statute is unconstitutional.

Plaintiff first applied for Hospital Insurance Entitlement March 23, 1966. An application form was presented to her, containing an inquiry as to whether plaintiff was then, or had been during the preceding 12 months, a member of any organization which is required to register under the Internal Security Act of 1950 as a Communist-action organization, a Communist-front organization, or a Communist-infiltrated organization. Plaintiff declined to answer the question. She likewise refused to sign a disclaimer of such membership. Plaintiff has maintained this position in later communications with representatives of the Social Security Administration.

One week before this matter was to be heard on the merits, the Social Security Administration approved plaintiff's application for benefits. The Notice of Health Insurance Entitlement sent to her contained a monition:

> "The law prohibits entitlement to hospital insurance benefits for individuals who are . . . members of any organization which is registered or [required] to register under the Internal Security Act of 1950, as amended, as Communist-Action, Communist-Front, or

> Communist-infiltrated organizations. . . . Failure to reveal such membership . . . is misrepresentation of a material fact and subject to penalty [of] not more than a $1,000 fine or 1 year of imprisonment, or both."

There follows a list of eight organizations to which the restriction applies.

The above-quoted language does not appear on the printed form of applications for Medicare benefits. It was typewritten on plaintiff's certificate of Entitlement. The court was informed similar language has been inserted in the certificates of other persons who have declined to answer the pertinent question or to sign the disclaimer.

Plaintiff contends, *inter alia,* that Section 103 (b) (1) violates her First Amendment rights of freedom of speech, assembly, and association.

The Government urges that the question need not be answered nor the disclaimer signed, that refusal to answer the question or to sign the disclaimer does not in itself bar an individual from receiving benefits if investigation discloses no affiliation with the organizations, and further, that having received her Notice of Health Insurance Entitlement, plaintiff has no standing to maintain the action.

Antithetically to the Government's representation that the question need not be answered, there appears the persistent effort of the Social Security Administration to extract an answer from the plaintiff.

Neither the applicant, nor anyone similarly situated, is informed, when applying for benefits, that he is not required to answer the question or sign the disclaimer. The Government does not, at any time during the processing of

the application, indicate to an applicant who has refused to sign the disclaimer or answer the question that such is not required as a condition to the processing of the application. If the question is not answered, as in plaintiff's case, written request is sent to the applicant pointing to the fact that the question has not been answered and requesting the information. When plaintiff protested answering the question, the Government agent to whom she spoke wrote her objection on a form and had her sign it. The agent remarked that plaintiff was the first to refuse to answer the question.

There is no evidence that all applicants in plaintiff's status who refuse to answer the pertinent question will receive any advice other than that given plaintiff or not undergo the same procedure and requirements. Furthermore, the "Notice of Health Insurance Entitlement," which certifies that plaintiff is entitled to the insurance benefits and which was issued on September 29, 1966, states, among other things, that "Failure to reveal such membership in connection with the application for the benefit herein awarded is misrepresentation of a material fact and subject to penalty." The Certificate goes on to state, "Whoever makes any false representation of a material fact in an application for determination of a right to benefits under the Social Security Act is subject to not more than a $1,000 fine or 1 year of imprisonment, or both." It would follow that if one belongs to one of the organizations listed with the Attorney General as named in defendant's Exhibit I, and does not answer the question in the application, it could well be deemed a "failure to reveal such membership" and subject the applicant to prosecution for misrepresentation

of a material fact. It appears to this court that the Government is saying on the one hand that the question need not be answered and on the other that one failing to reveal such membership is subject to penalty.

We have read with interest the opinion of the three-judge court in *Weiss* v. *Gardner,* No. 66-Civil-498, U.S.D.C., S.D. of N.Y., filed October 11, 1966, Judge Bonsal dissenting. There the plaintiff questioned the constitutionality of (1) the statute here involved, Section 103 (b) (1) of the Act, and (2) "the use of" the disclaimer clause or question referred to above in the application. The action was dismissed for lack of jurisdiction.

It is to be noted that the facts in the *Weiss* case are quite different from those in the case at bar, particularly as concerns the issue of the standing of the plaintiff to question the constitutionality of Section 103 (b) (1). In the *Weiss* case, the plaintiff had *not signed* an application.

In the instant case, the plaintiff, after six months delay, was approved for the benefits and sent a Notice of Entitlement thereto (Exhibit I), but there was a marked difference in her treatment as compared to that accorded applicants who had answered the question, including the long delay resulting from her refusal to answer same.

In the case of *Short* v. *Gardner,* No. 66-282, which was before this court a short time prior to the case at bar, the defendant represented to the court and plaintiff therein that the subject question need not be answered. Based on such representation and the further statement of defendant's counsel that the Department of Health, Education and Welfare was going to seek legislation to eliminate the section of the Act which prompted the objectionable ques-

tion, plaintiff in the *Short* case, on March 25, 1966, stipulated to dismissal and the case was thereupon dismissed.

Having in mind all of the facts and circumstances in the case at bar, the court concludes that plaintiff Reed has been denied rights and suffered injuries, even though her application was finally approved, which there is no reason to believe will not continue as to those similarly situated and that, therefore, plaintiff Reed has standing to raise the constitutional issue.

Although not set forth hereinabove, the application for benefits asks for membership in the subject organizations for the past twelve months whereas the statute refers to membership only at the beginning of the first month of eligibility.

The Government takes the position that the Social Security Administration has no authority under the Act to award benefits to plaintiff or those similarly situated without requiring an answer to the question or a check into membership in the organizations referred to. It insists that it is required to deny benefits if membership is found whether it appears the applicant is an active member or knowingly subscribes to the purposes of the organization whatever they may be.

Six months elapsed between plaintiff's initial application and the issuance of her certificate; the Government introduced evidence showing the normal processing period is approximately 30 days. When the certificate of Entitlement was issued, plaintiff (like others in her class) was singled out for warnings noted above not contained in certificates issued to other applicants.

The Supreme Court of the United States in its opinion in *Aptheker* v. *Secretary of State* (1964), 378 U.S. 500 at 516-517, quotes from *N.A.A.C.P.* v. *Button,* 371 U.S. 415, as follows:

> "'[I]n appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar. *Thornhill* v. *Alabama,* 310 U.S. 88, 97-98; *Winters* v. *New York,* [333 U.S. 507], 518-20. Cf. *Staub* v. *City of Baxley,* 355 U.S. 313. . . . The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. Cf. *Marcus* v. *Search Warrant,* 367 U.S. 717, 733. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.' 371 U.S., at 432-433."

It is to be noted that the above quotation is immediately preceded in the opinion in the *Button* case, at page 432 of that opinion, by the statement:

> "Furthermore, the instant decree may be invalid if it *prohibits* privileged exercises of First Amendment rights whether or not the record discloses that the peti-

tioner has engaged in privileged conduct." [Emphasis added.]

The decision of the Supreme Court of the United States in the case of *Elfbrandt* v. *Russell,* 384 U.S. 11 (1966), compels a holding that the statute runs counter to the First Amendment. The explicit language of this decision clearly establishes that Section 103 (a) (1) and the propounding of the subject question are violative of the First Amendment to the United States Constitution.

The *Elfbrandt* case, *supra,* involved questions concerning the constitutionality of an Arizona statute requiring an oath from State employees pertaining to their becoming or remaining members of the Communist Party or successor or subordinate or other organization having as one of its purposes the overthrow of the government of Arizona when the employee had knowledge of the unlawful purpose.

After commenting on *Baggett* v. *Bullitt,* 377 U.S. 360; *Scales* v. *United States,* 367 U.S. 203, 229; and *Noto* v. *United States,* 367 U.S. 290, 299-300, the Court states:

> "Any lingering doubt that proscription of mere knowing membership, without any showing of 'specific intent,' would run afoul of the Constitution was set at rest by our decision in *Aptheker* v. *Secretary of State,* 378 U.S. 500. We dealt there with a statute which provided that no member of a Communist organization ordered by the Subversive Activities Control Board to register shall apply for or use a passport. We concluded that the statute would not permit a narrow reading of the sort we gave § 2385 in *Scales.* See 378 U.S., at 511, n.9. The statute, as we read it, covered mem-

bership which was not accompanied by a specific intent to further the unlawful aims of the organization, and we held it unconstitutional.

"The oath and accompanying statutory gloss challenged here suffer from an identical constitutional infirmity. One who subscribes to this Arizona oath and who is, or thereafter becomes, a knowing member of an organization which has as 'one of its purposes' the violent overthrow of the government, is subject to immediate discharge and criminal penalties. Nothing in the oath, the statutory gloss, or the construction of the oath and statutes given by the Arizona Supreme Court, purports to exclude association by one who does not subscribe to the organization's unlawful ends. Here as in *Baggett* v. *Bullitt, supra,* the 'hazard of being prosecuted for knowing but guiltless behavior' (*id.*, at 373) is a reality." (Page 16)

* * * * *

"Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees. Laws such as this which are not restricted in scope to those who join with the 'specific intent' to further illegal action impose, in effect, a conclusive presumption that the member shares the unlawful aims of the organization. See *Aptheker* v. *Secretary of State, supra,* at 511. The unconstitutionality of this Act follows *a fortiori* from *Speiser* v. *Randall,* 357 U.S. 513, where we held that a State may not even place on an applicant for a tax

exemption the burden of proving that he has not engaged in criminal advocacy.

"This Act threatens the cherished freedom of association protected by the First Amendment, made applicable to the States through the Fourteenth Amendment." (Pages 17-18)

• • • • •

"A statute touching those protected rights must be 'narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State.' *Cantwell* v. *Connecticut,* 310 U.S. 296, 311. Legitimate legislative goals 'cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' *Shelton* v. *Tucker,* 364 U.S. 479, 488." (Page 18)

• • • • •

"A law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of 'guilt by association' which has no place here. See *Schneiderman* v. *United States,* 320 U.S. 118, 136; *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 246. Such a law cannot stand." (Page 19)

The Government concedes the statute would be unconstitutional *unless* it be saved by the fact Medicare benefits are a "gratuity" as to persons not covered by Social Security or Railroad Retirement.

The contention that the constitutional infirmity is cured by the gratuitous nature of the benefits is answered by the Supreme Court in the case of *Speiser* v. *Randall*, 357 U.S. 513 (1958), wherein the Court stated, at p. 518:

> "The appellees are plainly mistaken in their argument that, because a tax exemption is a 'privilege' or 'bounty,' its denial may not infringe speech. . . . [C]onditions imposed upon the granting of privileges or gratuities must be 'reasonable.'"

See also *Sherbert* v. *Verner*, 374 U.S. 398 (1963), wherein the Court in referring to the *Speiser* case, *supra*, said, at p. 405:

> ". . . conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms. We there struck down a condition which limited the availability of a tax exemption to those members of the exempted class who affirmed their loyalty to the state government granting the exemption. While the State was surely under no obligation to afford such an exemption, we held that the imposition of such a condition upon even a gratuitous benefit inevitably deterred or discouraged the exercise of First Amendment rights of expression and thereby threatened to 'produce a result which the State could not command directly.' 357 U.S. 526."

The court recognizes that it should not decide a case on an issue of constitutionality when the dispute may be

properly disposed of on other grounds. *Ashwander* v. *Valley Authority,* 297 U.S. 288, at 347. The court has also considered defendant's contention that plaintiff must first exhaust her administrative remedies. Even if plaintiff were to exhaust administrative remedies, if they have not already been exhausted, the constitutional question would remain undecided.

In *Public Utilities Commission of California* v. *United States,* 355 U.S. 534, the Court, at pp. 539-540, discusses this point and, after observing the general rule that requires the complainant first to seek relief in administrative proceedings before a remedy will be supplied by the Court, goes on to say that there was a constitutional question in that case to be decided, which issue " . . . the Commission can hardly be expected to entertain." The Court further states, at pp. 539-540:

> "If . . . an administrative proceeding might leave no remnant of the constitutional question, the administrative remedy plainly should be pursued."

Pursuit of administrative remedy to finality in the instant case, assuming such has not been done, would obviously leave the constitutional issue undetermined. See also *Chicago* v. *Atchison, T. & S. F. R. Co.,* 357 U.S. 77, 89 (1958), and 3 Davis, Administrative Law Treatise, Section 20.04, 1958, Supp. 1965.

As in the *Weiss* case, *supra,* the defendant here urges that its investigation of the organizational status of an applicant who does not answer the question or sign the disclaimer will be limited to checking the files of the Jus-

tice Department. Judge Bonsal, at page 6 of his dissenting opinion in the *Weiss* case, states:

> "The plaintiffs contend, however, that Section 103 (b) is unconstitutional on its face. If so, laxity in its enforcement would not make the statute constitutional."

The same factors apply in our case.

For the reasons stated hereinabove, the court finds plaintiff has standing to maintain this action. The court concludes that Section 103 (b) (1) of the Act and the use of the subject question or disclaimer are unconstitutional as violative of the First Amendment of the United States Constitution and that plaintiff is entitled to a permanent injunction as prayed for in the complaint.

Having determined that the statute infringes plaintiff's rights guaranteed by the First Amendment, the court need not, and does not, rule on the remaining issues raised.

This opinion shall constitute the court's findings of fact and conclusions of law, in compliance with Fed. R. Civ. P. Rule 52 (a).

Counsel for plaintiff shall prepare, serve and lodge a judgment in conformance herewith.

Dated this 14th day of November, 1966.

WALTER ELY
Circuit Judge

THURMOND CLARKE
Chief District Judge

E. AVERY CRARY
District Judge

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 904

ALINE P. WEISS AND ALICE K. POLLITZER,
APPELLANTS

v.

JOHN W. GARDNER, SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, AND BERNICE L. BERNSTEIN, REGIONAL DIRECTOR OF DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

SUGGESTION OF MOOTNESS

Section 103(b)(1) of the Social Security Amendments of 1965, 79 Stat. 333, 42 U.S.C. (1965 Supp.) 426, note, prohibits the payment of certain medical and hospital insurance ("medicare") benefits to individuals who are members of organizations which are registered, or are under a final order to register, under the Subversive Activities Control Act of 1950 as Communist-action, Communist-front or Communist-infiltrated organizations. To administer this statutory provision, the Secretary of Health, Education, and Welfare has

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included in the form application for medicare benefits a statement, to be signed by the applicant, certifying that he is not a member of such an organization (J.S. App. 16–17).

Appellants instituted this action for a declaratory judgment and injunctive relief in the United States District Court for the Southern District of New York, challenging the constitutionality of Section 103(b)(1) and of the inclusion of the organizational membership disclaimer in the application form. The impanelment of a three-judge court was sought and granted (J.S. App. 31–36). A majority of the court, after hearing, dismissed the complaint on the ground that appellants lacked standing to challenge Section 103(b)(1) since, so far as appeared, they were not members of any organization enumerated in the statute and had not been denied benefits on that or any other ground (J.S. App. 16–21). Neither the court nor its dissenting member (J.S. App. 22–30) reached the merits of the constitutional challenge made by appellants. The judgment of the district court was entered on October 13, 1966 (J.S. App. 13–14), and a notice of direct appeal to this Court was filed on October 27, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

We are submitting this memorandum to advise the Court of circumstances which have occurred since the filing of appellants' Jurisdictional Statement and which, in our view, render the case moot. On November 14, 1966, a three-judge district court in the Central District of California, considering a similar

challenge to the constitutionality of Section 103(b)(1) and the disclaimer in the medicare application, issued an opinion in which it held that the statutory provision was unconstitutional and that a response to the statement could not be demanded of medicare applicants. *Reed* v. *Gardner,* No. 66–1224–TC Civil (J.S. App. 37–49). On December 5, 1966, that court entered a judgment in which it declared Section 103(b)(1) unconstitutional and permanently enjoined the Secretary of Health, Education and Welfare, his successors, and all persons acting pursuant to his direction and control from enforcing, operating under or executing Section 103(b)(1), from submitting to "persons covered by Section 103(a)" the "disclaimer or question pertaining to organizational membership such as appear" on the medicare application forms, and from investigating the organizational membership of medicare applicants (Appendix, *infra*).

The Solicitor General, on behalf and with the concurrence of the Secretary of Health, Education, and Welfare, has determined not to appeal the decision in *Reed* v. *Gardner.* Although the judgment in that case invalidates, on constitutional grounds, an Act of Congress—a result which ordinarily would warrant an appeal to this Court—we have concluded that the decision of this Court in *Elfbrandt* v. *Russell,* 384 U.S. 11, decided almost nine months after the enactment of Section 103(b)(1), forecloses any argument that the challenged provision is constitutional. This Court held in *Elfbrandt* that the State of Ari-

zona could not constitutionally bar from public-school employment any person who refused to swear that he would not knowingly become or remain a member of an organization one of whose purposes was the violent overthrow of the government so long as the State oath was not construed as requiring specific intent to further the organization's unlawful purposes and active membership in such organization. We recognize that the public policy in disqualifying all members of Communist organizations (whether or not they are active and adhere to the organizations' unlawful purposes) from receipt of medicare benefits must be deemed less substantial than was Arizona's interest in disqualifying such members from employment in the public schools.[1] Consequently, we feel that whatever litigable doubts may have existed regarding the constitutionality of Section 103(b)(1) at the time of its enactment have been resolved against its validity by this Court's subsequent decision in *Elfbrandt*.

The judgment in *Reed* v. *Gardner* declares Section 103(b)(1) unconstitutional and enjoins the Secretary of Health, Education, and Welfare from enforcing the provision anywhere in the United States *vis-à-vis* any applicant for medicare benefits. It therefore gives the appellants in this case all the relief which they seek in their complaint. Hence the only ques-

[1] Compare our views in *United States* v. *Robel*, No. 83, this Term, Brief for the United States, pp. 41–42. See, also, 20 U.S.C. 581(f)(4) and 42 U.S.C. 1874(d)(2). These statutes, like the one in *Robel*, implement a more substantial governmental interest in legislation of the kind involved here.

tion resolved by the court below—whether appellants had standing to challenge the statute and its application—is now moot. See *Taylor* v. *McElroy*, 360 U.S. 709; *Bryan* v. *Austin*, 354 U.S. 933; *United States* v. *Alaska S.S. Co.*, 253 U.S. 113; *Berry* v. *Davis*, 242 U.S. 468; cf. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36. Although we believe that the decision of the court below is correct, the Court may, in these circumstances, deem it appropriate to vacate the judgment below and remand the case to the district court with instructions to dismiss the complaint as moot. *E.g., United States* v. *Leiter Minerals, Inc.*, 381 U.S. 413; *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39.

Respectfully submitted.

THURGOOOD MARSHALL,
Solicitor General.

JANUARY 1967.

APPENDIX

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA

No. 66-1224-TC, Civil

ALDA T. REED, ON BEHALF OF HERSELF AND ALL PERSONS SIMILARLY SITUATED, PLAINTIFF

v.

JOHN W. GARDNER, AS SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, DEFENDANT

JUDGMENT

(Filed December 5, 1966)

This cause came on regularly for trial on October 6, 1966 before the Hons. Walter Ely, Circuit Judge, Thurmond Clarke, Chief District Judge and E. Avery Crary, District Judge, constituting a three judge court convened pursuant to the provisions of 28 U.S.C. 2282 and 2284. A. L. Wirin, Fred Okrand and Laurence R. Sperber, Esqs. by A. L. Wirin and Fred Okrand appeared as counsel for plaintiff. Manuel L. Real, United States Attorney, Frederick M. Brosio, Jr., and M. Morton Freilich, Assistants United States Attorney, by M. Morton Freilich and Ruth Harwitz, Assistant Regional Counsel, Department of Health, Education and Welfare, appeared as counsel for defendant. The Court, sitting without a jury, made and entered its Findings of Fact and Conclusions of Law on November 14, 1966, in compliance with Rule 52(a),

Federal Rules of Civil Procedure. In accordance with said Findings of Fact and Conclusions of Law, IT IS ORDERED, ADJUDGED AND DECREED:

1. Section 103(b)(1) of the Social Security Amendments of 1965 (79 Stat. 333; note to 42 USCA 426) is unconstitutional;

2. The defendant, John W. Gardner, as Secretary of the United States Department of Health, Education and Welfare, his successors, and all persons acting pursuant to his direction and control, are permanently enjoined from enforcing, operating under or executing the provisions of said Section 103(b)(1), and from submitting to persons covered by Section 103(a) of the Social Security Amendments of 1965 (79 Stat. 333; note to 42 USCA 426) an Application for Hospital Insurance Entitlement containing a disclaimer or question pertaining to organizational membership such as appear on Social Security Administration Forms SSA–18 (8–65) and (9–65) and SSA–1497 (11–65), and from inquiring or investigating, or causing inquiry or investigation to be made, as to the organizational membership of plaintiff and all other persons who, without having answered said organizational disclaimer or question, have submitted Applications for Hospital Insurance Entitlement which contained such a disclaimer or question.

Dated at Los Angeles, California this 5th day of December, 1966.

WALTER ELY,
Circuit Judge.
THURMOND CLARKE,
Chief District Judge.
E. AVERY CRARY,
District Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1967

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

WEISS ET AL. *v.* GARDNER, SECRETARY, HEALTH, EDUCATION & WELFARE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 904. Decided February 13, 1967.

PER CURIAM.

The judgment of the court below is vacated and the case is remanded to the United States District Court for the Southern District of New York with instructions to dismiss the complaint as moot.